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No. 95-1159

In the

Supreme Court of the United States

October Term, 1995

NANSAY HAWAII, INC.,
Petitioner,

v.

PUBLIC ACCESS SHORELINE HAWAII,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Hawaii

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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30 pp

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Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves this Court for leave to file the attached amicus curiae brief in support of petitioner, Nansay Hawaii, Inc. Consent to the filing of this brief has been granted by counsel for petitioner, and has been lodged with the Clerk of this Court. Respondent, Public Access Shoreline Hawaii, has withheld consent, necessitating the filing of this motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has over 20,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of a brief *amicus curiae* in this matter.

PLF has participated in numerous cases involving constitutional protection of property rights before this Court and other courts representing both *amicus curiae* and property owners. Particularly noteworthy of PLF's involvement in land use and the Takings Clause cases, Foundation attorneys represented the Nollans in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and participated as *amicus curiae* in cases from *Agins v. City of Tiburon*, 447 U.S. 255 (1980), to *Dolan v. City of Tigard*, 512 U.S. ___, 129 L. Ed. 2d 304 (1994).

PLF seeks to augment the argument in the petition for writ of certiorari. PLF believes that its public policy perspective and litigation experience in support of economic rights will provide an additional needed viewpoint with respect to the issues presented by this case.

For the above reasons, Pacific Legal Foundation requests that its motion to file the amicus curiae brief which follows be granted.

DATED: March ___, 1996.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interests of amicus curiae are set forth in the preceeding motion and are adopted herein.

STATEMENT OF THE CASE

Petitioner, Nansay Hawaii, Inc. (Nansay), is the owner of real property on the Big Island of Hawaii. Seeking to develop

otherwise fallow ground, Nansay applied for a Special Management Area Use Permit from the Hawaii Planning Commission (Commission). A public hearing was held by the Commission at which Public Access Shoreline Hawaii (PASH), a group alleging interests in public beach access, and Mr. Angel Pilago[1] sought to intervene in opposition to the application. When no party opposing the permit could explain how his interests were distinguishable from those of the general public, the Commission granted Nansay's application for the permit.

PASH appealed the final decision of the Commission, pursuant to Hawaii Revenue Statute §§ 91-14 and 205A-6. On June 7, 1991, the Hawaii Circuit Court for the Third Circuit reversed the Commission, holding that PASH and Mr. Pilago had individual interests grounded in traditional rights and religious practices.

Nansay appealed the decision to the Intermediate Court of Appeal which on May 7, 1993, reversed the lower court as to Mr. Pilago but affirmed the court as to the grounds upon which relief was granted to PASH. Nansay petitioned for a writ of certiorari to the Hawaii Supreme Court which granted certiorari and then ruled that newly expanded native Hawaiian gathering rights must be protected under the Hawaii Constitution and Hawaiian law.

Before this decision, a Hawaiian native tenant could gather items such as leaves and firewood from the land so long as the tradition had been practiced by the native or his predecessors and this gathering did not interfere with the rights of the landowner. However, if the landowner developed the land, eliminating the source of the gathered items, the gathering right could be extinguished. After the decision, the gathering right is extended to anyone with even a drop of Hawaiian ancestry who might assert an interest in gathering, irrespective of whether the practice had been observed in the past. Furthermore, the landowner can be prevented from engaging in any development which might eliminate the source of the gathered items. As a result of this

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[1] A native Hawaiian no longer a party to this litigation.

decision, Nansay's right to develop its property has been abridged if not enjoined altogether.

Nansay petitioned for, and Pacific Legal Foundation supports, a writ of certiorari to the Supreme Court of the United States.

SUMMARY OF ARGUMENT

The rights of the people inhabiting the islands of Hawaii have been regulated and defined by written laws since 1839. In that year, His Majesty King Kamehameha III, as Supreme Lord of the Islands, took possession of all of the fishing grounds. He then gave one-third of the grounds to the common people, one third to the landlords, and retained one-third for himself. *Haalelea v. Montgomery*, 2 Haw. 65 (1858). Given this Court's extensive treatment of the Takings Clause, there can be no doubt that had King Kamehameha attempted this forced redistribution of land today without providing adequate compensation, he would have violated the Takings Clause of the Fifth Amendment as applied to the States by the Fourteenth Amendment. However, this Court's lessons have failed to impress the Hawaiian Supreme Court which in this case has so manipulated Hawaiian law as to threaten the very notion of property ownership, a unilateral action no less serious than the King's redistribution.

In this case, the Supreme Court of the State of Hawaii expanded a relatively benign native gathering custom to such an extraordinary degree that it now threatens owners of property in Hawaii who seek to develop their land. This expansion was not the result of any passage of new law nor consistent with past interpretations of Hawaiian law. Facing a challenge that its decision violated the United States Constitution, the Hawaiian Supreme Court declared that western understandings of property law are not universally applicable in Hawaii.

The decision of the Hawaiian high court is disturbing for at least two reasons: Firstly, by taking Nansay's property without providing just compensation, the state has violated the Fifth and Fourteenth Amendments. Secondly, should the decision stand, the ability of the state, under the guise of custom, to exact any

servitude against property owners shall go unchecked. This could result in a redistribution of property interests, if not a fundamental redefinition of property, the likes of which has not occurred since the time of King Kamehameha III.

The ruling of the Hawaiian court is in direct conflict with decisions of this Court. Furthermore, given the extraordinary degree to which the decision departs from accepted case law, the United States District Court for the District of Hawaii as well as the Ninth Circuit Court of Appeals have already rejected its holdings in the short time that has passed since this state court decision was rendered.

The decision profoundly affects the rights of property owners to their detriment, raising issues of tremendous national importance which should be resolved by this Court.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

"The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribune was, in the words of John Rutledge of South Carolina, 'to secure the national rights & *uniformity of judgments*.'" Chief Justice Vinson, Address Before the American Bar Association, September 7, 1949, 69 S.Ct. v, vi (emphasis added). Chief Justice Vinson's observations are codified in Supreme Court Rule 10(c) which lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court. Rule 10(b) includes as grounds for review when a state court of last resort has decided an important federal question in a way that conflicts with the decision of a United States Court of Appeals. These compelling grounds for review are present in this case.

THIS COURT SHOULD RESOLVE THE CONFLICT OVER WHETHER THE EXPANSION OF NATIVE HAWAIIAN GATHERING RIGHTS CONSTITUTES A TAKING REQUIRING JUST COMPENSATION

A. The Decision Is in Conflict with the Decisions of the Supreme Court

Nearly three-quarters of a century have passed since Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), warned that when the protection of private property "is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Id.* at 415. "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.*

In *Nansay Hawaii, Inc. v. Public Access Shoreline Hawaii*, 79 Haw. 425, 903 P.2d 1246 (1995), this Court is presented with the very type of case of which Justice Holmes foretold. Here, a native gathering right to gather firewood, house-timber, aho cord, thatch, or ki leaf has been permitted to blossom under the nurturing care of the Hawaiian Supreme Court until now, like a vine which would strangle the tree on which it has taken hold, this "custom" threatens to eclipse and perhaps even extinguish the rights of the holder of the estate in fee.

The manner by which the Hawaiian court has transformed a custom of native gathering rights into a protected interest superior to that of the property owner bears some recounting, if only because of its extraordinary evolution.

The modern development of Hawaiian property ownership could be said to have begun in 1846 when the territorial government enacted the "Principles Adopted by the Board of Commissioners to Quiet Land Titles in the Adjudication of Claims Presented to Them," which set forth three classes possessing vested land rights: the government, the landlord, and the tenant. Louis Cannelora, THE ORIGIN OF HAWAII LAND TITLES AND OF THE RIGHTS OF NATIVE TENANTS 1, 10 (1974), *quoted in Pai 'Ohana v. United States*, 875 F. Supp. 680, 685-86 (D. Haw.

1995), *aff'd*, ___ F.3d ___ (9th Cir.) (1996 WL 44731) (Feb. 2, 1996).

The Act of June 7, 1848, 2 REV. LAWS HAW. 2152-76 (1925), distributed land subject to the rights of the native tenants. Later acts would define the rights, granting authority to the Land Commission to award fee simple titles to native tenants who occupied and improved the land.

Although subjected to various interpretations in the intervening hundred years, in addition to Article XII of the Hawaiian Constitution,[2] two documents serve as the sources from which native Hawaiian rights are derived: Hawaii Revised Statutes §§ 7-1 and 1-1.

> Section 7-1 preserves to native tenants:
> the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way.

Haw. Rev. Stat. § 7-1 (1859, as amended 1955).

However, it is the last source, Hawaii Revised Statutes § 1-1, as interpreted and applied by the Hawaiian Court in this case, that proves the most unsettling. That section provides:

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[2] Hawaii Constitution, Article XII, Section 7, provides:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are decendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

Haw. Const. Art. XII, § 7 (enacted 1978). To the extent that the section does no more than reaffirm laws previously in existence, it does not in and of itself constitute a taking. However, if as here the courts are permitted to use the section to justify the creation of new customs and traditions which impose unreasonable limitations on property owners, the new interpretation goes too far and a taking should be recognized. *Pennsylvania Coal*, 260 U.S. at 415.

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as ... established by Hawaiian usage ... .

Haw. Rev. Stat. § 1-1 (1892, as amended 1955).

Previous courts of Hawaii attempted to define this section by reference to the exception. However, these decisions typically related to procedural or technical aspects of laws and rarely, if ever, imposed limitations upon or abrogated substantial liberty or property interests. For example, in *Kaleialii v. Sullivan*, 23 Haw. 38 (1915), *aff'd*, 242 F. 446 (9th Cir. 1917), the court held that the word "heir" was not essential to convey a fee simple in Hawaii. These early interpretive efforts may be ascribed to a willingness on the part of the Hawaiian courts to apply with some degree of tolerance a body of English common law as far removed from the former Hawaiian territory as are poles of the two hemispheres.

In *Hawaii v. Zimring*, 52 Haw. 472, 479 P.2d 202 (1970), the Supreme Court recognized that under Section 7-1 the usage which establishes an exception must predate November 25, 1892, and could not be established by a generalized affidavit of the kind proferred in that case.[3] In *County of Hawaii v. Sotomura*, 55 Haw. 176, 183, 517 P.2d 57, 62 (1973), the Court stated that in the "absence of ... evidence of Hawaiian custom relevant to the question, we resort to common law principles."

Even as late as 1982, the Hawaii Supreme Court continued to recognize the delicate balance that must be maintained between custom and common law, ensuring that the one did not overwhelm the other to unconstitutional proportions. In *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 4-7, 656 P.2d 745, 748-50 (1982), the court reaffirmed an obligation to recognize native Hawaiian gathering rights, "remnants of an economic and physical existence

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[3] The affiant deposed that he was familiar with land usage on the island and its relation to volcanic eruptions, "both of his own knowledge and knowledge transmitted to him by his mother and ... father." *Hawaii v. Zimring*, 479 P.2d at 203.

largely foreign to today's world," *id.* at 749, even when they may "conflict with the exclusivity traditionally associated with fee simple ownership of land." *Id.* at 748. However, the court emphasized that the gathering rights were limited by the unambiguous language of the statute.

> These rights are rights of access and collection. They do not include any inherent interest in the natural objects themselves until they are reduced to the gatherer's possession. *As such those asserting the rights cannot prevent the diminution or destruction of those things they seek. The rights therefore do not prevent owners from developing lands.*

Id. at 749 n.2 (emphasis added). The court continued:

> [I]f this limitation were not imposed, there would be nothing to prevent residents from going anywhere within the ahupua'a, including fully developed property, to gather the enumerated items. In the context of our current culture this result would so conflict with understandings of property, and potentially lead to such disruption, that we could not consider it anything short of absurd and therefore other than that which was intended by the statute's framers.

Id. at 750.[4]

Notwithstanding its decision in *Kalipi*, begining in 1992, the Hawaii Court appeared to depart from its practice of harmonizing Hawaiian custom and property rights protected under the Fifth and Fourteenth Amendments to the United States Constitution.

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[4] An *ahupua'a* is a division of land running from the mountains to the sea which provides a variety of resources needed for subsistence. *Palama v. Sheehan*, 50 Haw. 298, 301, 440 P.2d 95 (1968). This division provides access for the residents to a wide variety of climatic and biological zones.

Only ten years after its decision in *Kalipi*, the Court revisited its interpretation of the statute, this time extending native gathering rights beyond the "unambiguous language of the statute." *Kalipi*, 656 P.2d at 750. In *Pele Defense Fund v. Paty*, 73 Haw. 572, 837 P.2d 1247 (1992), the court held that native Hawaiian rights might extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner.

In this case, the Hawaiian Court, continuing its activist treatment of native rights, rejected the express limits in Section 7-1, expanding without definition the types of practices which could be considered customary. Nansay Hawaii, Inc.'s Petition for Writ of Certiorari at Appendix (Pet. App.) 37a. Furthermore, the court vastly increased the numbers of those who could assert claims of native rights, eliminating the requirement of residency which existed after *Pele*. Pet. App. at 52-53a. Finally, the Court ruled for the first time that this "gathering right" could be asserted to the *exclusion* of the owner's right to develop. Pet. App. at 58-59a.

This decision is but one more step in a chain of judicial decrees which has caused the subordination of private property interests to customs, whether ancient or newly crafted.

The important lessons of this case, as decided by the Hawaiian Supreme Court, may be drawn from the following excerpted passages:

> [W]e read the discussion of customary rights in *Oni* and *Kalipi* as merely informing us that the balance of interests and harms clearly favors a right of exclusion for private property owners as against persons pursuing *non-traditional* practices or exercising otherwise valid customary rights in an *unreasonable* manner.

Pet. App. at 36-37a (emphasis in original).

Here, the court defines the moment of departure from every one of its precedents. Past cases did not only exclude "nontraditional" or "unreasonable" practices. Rather, gathering rights were strictly limited to those enumerated in the statute and could be extinguished were the land developed and the resources

no longer to be found or practically gathered. *Kalipi*, 656 P.2d at 749 n.2.

> Common law rights ordinarily associated with tenancy do not limit customary rights existing under the laws of this state.

Pet. App. at 53a.

The effect of this statement is twofold. Firstly, the court turns its back on Hawaiian history and its own decisions relating to the requirement of tenancy.[5] Secondly, the court expands the class of those who may assert standing to challenge a permit to those who would otherwise be ineligible to claim rights under customs protected by the statutes.

1. Regulatory Taking

This Court has heretofore observed "that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958)). Factors which could lead to the conclusion that a taking had occurred include the regulation's economic impact on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action. 438 U.S. at 124. Applying these factors to this case, the Hawaiian

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[5] As was stated in *Kalipi*:

> We ... interpret[] the gathering rights of § 7-1 to assure that lawful occupants of an *ahupua'a* may, for the purpose of practicing native Hawaiian customs and traditions, enter undeveloped lands within the *ahupua'a* to gather those items enumerated in the statute. ... By "lawful occupants" we mean persons residing within the *ahupua'a* in which they seek to exercise gathering rights. ... This limitation is dictated by the language of the statute itself. ... It requires that the tenants be "on" the land before they become entitled to take products "from the land on which they live."

Kalipi, 656 P.2d at 749-50 (emphasis added).

statutes as interpreted by the State Court and as applied effect a taking of Nansay's property.

However, more recently, this Court held that states cannot decree limitations anew which prohibit all economically beneficial use of the land without compensation.

> Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992).

In this case, the Hawaiian court has so convoluted state laws as to extinguish both a valuable right of petitioner to develop its property and any vitality in *Lucas*. Attempting to *Lucas'* language, the court finds justification for its actions not in a new legislative decree but, rather, in an "ancient custom."

The Hawaii court analogizes its application of custom to that of a preexisting easement. Pet. App. at 61a (quoting *Lucas*, 505 U.S. at 1027). However, in so doing, the court fails to appreciate the magnitude of its decision upon private property interests. Customs cannot be compared to permanent easements, the bounds of which can more easily be ascertained, their characteristics defined, and rights thereto established. Rather, customs are more subjective and less absolute.[6]

Accordingly, pursuant to the newly minted doctrine of the Hawaiian court, a person who has any degree of Hawaiian kinship traceable to 1778 and who can articulate an interest in some way grounded in Hawaiian custom and usage, can impress upon an estate a new servitude which can serve as an impediment to development. Such a servitude has never been recognized and is,

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[6] Custom as been defined as "such a usage as by common consent and uniform practice has become of the law of the place, or of the subject matter to which it relates." *Oregon v. Hay*, 254 Or. 584, 462 P.2d 671 (1969) (quoting 1 BOUV. LAW DICT., Rawle's Third Revision, Vol. 1 at 742 (1914)).

indeed, contrary to the traditional understandings of Hawaiian custom and the law, as explained in *Oni v. Meek*, 2 Haw. 87 (1858); *In re Boundaries of Pulehunui*, 4 Haw. 239 (1879); *Damon v. Tsutsui*, 1 Haw. 678 (1930); and *Kalipi*, 656 P.2d 745.

Regrettably, Hawaii is not the first state to restrict property rights by application of "customs."[7] In his dissent in *Stevens v. City of Cannon Beach*, 317 Or. 131, 854 P.2d 449 (1993), *cert. denied*, ___ U.S. ___, 127 L. Ed. 2d 679 (1994), Justice Scalia warned of the risk to property rights when custom was used under the guise of "rules of state substantive law" to impose limitations on the use of property.

> [The] Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a State court chooses to denominate "background law" ... could eliminate property rights.

127 L. Ed. 2d at 682.

Here, the Hawaiian Court has significantly expanded laws relating to customs; rights of property owners reaffirmed by this Court in *Lucas* have been reduced to nothing more than western notions of property which must yield to native Hawaiian practices. This flagrant attempt to sidestep *Lucas* is the very type of case about which Justice Scalia warned and which this court should overrule. Before deferring to a newly crafted or recognized scheme of custom which would extinguish a vested property right,

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[7] In his commentaries, Sir William Blackstone set forth certain prerequisites for a custom: it must be ancient, used so long that there is no memory to the contrary; so to must it have been exercised without interruption; also, it must be peaceable and free from dispute; it must be reasonable, appropriate to the land and usages of the community; it must be certain as well as obligatory. Finally, the custom may not be inconsistent with other customs or laws. *Oregon v. Hay*, 462 P.2d at 677, *citing* 1 BLACKSTONE, COMMENTARIES 75-78.

this Court should demand nothing less than demonstrable evidence of the custom. It should be insufficient for anyone seeking to preclude Nansay from enjoying its property rights merely to allege that a custom exists which is incompatible with Nansay's development plans.

2. Judicial Taking

Nansay also challenges the decision as a judicial taking. Pet. at 21. Given the extraordinary degree to which the Hawaiian court changed the now dominating relationship of custom over common law property interests, this basis would have seemed entitled to some reasonable degree of inquiry, certainly far more than was accorded by the Hawaiian court which dispatched it with little if any regard.

In *Chicago, Burlington & Quincy Railroad Company v. City of Chicago*, 166 U.S. 226, 235 (1896), Justice Harlan, delivering the opinion of the Court, observed that a state may not disregard the prohibitions of the Fourteenth Amendment. Justice Harlan rhetorically asked if a state could "make anything due process of law which, by its own legislation, it chooses to declare such?" Having answered his own question in the negative, he averred that the same question posed in reference to judicial proceedings could lead to the same answer.

> If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is deemed the act of the state within the meaning of that Amendment.

Id. In response to Nansay's judicial takings claim, the Hawaiian court (Pet. App. at 60a) questions the viability of the judicial takings doctrine in light of *Corporation of Presiding Bishop v. Hodel*, 637 F. Supp. 1398 (1986), *aff'd*, 830 F.2d 374 (D.C. Cir. 1987), a case which is certainly not binding upon this Court.

Justice Harlan concluded that "without ... compensation the appropriation of private property to public uses, *no matter under what form of procedure it is taken*, would violate the provisions of

the Federal Constitution." *Chicago, Burlington & Quincy*, 166 U.S. at 239 (emphasis added). Nonetheless, the Hawaiian court relies upon its own rejection of non-Hawaiian jurisprudence to avoid certain constitutional infirmity, positing an argument which is *non sequitur* at best.

> Nansay's argument places undue reliance on western understandings of property law that are not universally applicable in Hawaii.

Pet. App. at 61a. In this case, the Hawaiian Supreme Court has taken three sources of law, two Hawaiian statutes and a contemporary addition to the state constitution, and so expanded the scope of "custom" as well as those who may claim the protection of customary usage, that the right to enjoy private property, guaranteed under the Fifth and Fourteenth Amendments has been virtually destroyed. Before its decision, only a tenant or the tenant's successors who had practiced native gathering rights could continue the custom and then, only if the land remained undeveloped and the resources were available. After the Hawaiian court's decision below, any person with even a drop of Hawaiian ancestry can claim a gathering right, even if not a tenant on the land and even if to do so would preclude the property owner from developing the land. The Hawaiian court has rewritten Hawaiian law in such a manner as is in conflict with this Court's takings decisions and violates the Fifth and Fourteenth Amendments to the United States Constitution.

3. Equal Protection

As was observed above, the Hawaii Supreme Court has sought by application of "Hawaiian customs" to strip this Court's decisions upholding property rights under the Fifth and Fourteenth Amendments of all meaning.

However, beyond the issue of property rights, by eliminating almost every requirement of the Hawaiian statute which limits gathering rights and increasing the numbers of those who can assert a claim, based solely on race, the Hawaiian court creates

a bundle of property rights for "native" Hawaiians at the expense of fee owners.[8]

The Fourteenth Amendment to the United States Constitution provides in part that no state shall deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. AMEND. XIV, § 1. This Court has consistently invalidated explicit governmental discrimination against minorities.[9]

While the general rule prohibits discrimination based on race, some classifications involving Native Americans have been upheld.[10] However, classifications relating to natives have been limited to cases involving Native American Indians and are based

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[8] While not treated by Nansay in its petition, Pacific Legal Foundation believes this issue to be of such importance as to warrant this Court's attention. Where necessary to properly dispose of the case, this court has on occasion requested that the parties address additional questions. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 n.12 (1981) (consideration of issues outside of bounds of questions with respect to which certiorari was granted not inappropriate when resolution of those questions is necessary for proper disposition of the case); *see also Pennhurst State School v. Halderman*, 447 U.S. 904 (1980) (granting writ of certiorari and requesting briefs and argument on additional question). Furthermore, given its importance, additional briefing by the parties on this issue may be warranted. *Allied-Signal, Inc. v. Director, Division of Taxation*, 503 U.S. 928 (1992) (restoring case to calendar for reargument and requesting supplemental briefs).

[9] *See, e.g., Loving v. Commonwealth of Virginia*, 388 U.S. 1, 11 (1967). "Over the years, this Court has consistently repudiated '(d)istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" (Citations omitted).

[10] *Morton v. Mancari*, 417 U.S. 535 (1974) (legislation which grants preference toward Indians is not invidious racial discrimination based on "Congress' unique obligation" toward the Indians); *Washington v. Confederated Bands and Tribes*, 439 U.S. 463 (1979).

on Congress' Article 1, § 8, power to deal with this group.[11] Furthermore, the classifications involved public "interests" such as jobs or federal property. However, this case implicates not a public but a *private* property interest.

The Hawaiian Court takes a portion of Nansay's property rights and gives it to native Hawaiians, based on nothing more than an evolving definition of "custom" and the presence of a drop of Hawaiian blood. There is no precedent nor can there be any justification for a forced redistribution of property interests based on the dubious racial classification, "a drop of Hawaiian blood," crafted by the Hawaiian court. Such an expansive redefinition of rights should be strictly scrutinized by this Court.

B. The Decision Is in Conflict with the Decisions of the United States Court of Appeals

In *Erie v. Tompkins*, 304 U.S. 64 (1938), this Supreme Court established the general principle that the decisions of a state's highest court constitute part of the "laws of the several states" which federal courts are required in civil actions to regard as rules of decision in cases where they apply. The Court of Appeals for the Fifth Circuit in *Maryland Casualty Co. v. Williams*, 377 F.2d 389 (5th Cir. 1967), regarded as a purpose for this principle the assurance of equal administration of justice in co-ordinate state and federal courts. And in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), this Court stated that property interests are not created by the Constitution but, rather, stem from such independent sources as state law.

Reading these three cases together, a federal court deciding a question relating to a property interest would appear compelled to follow state law.

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[11] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980); *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982).

However, precisely the reverse occurred in the case of *Pai 'Ohana v. United States*, 875 F. Supp. 680, *aff'd*, ____ F.3d ___. (1996 WL 44731).[12]

There the Court of Appeals, affirming the District Court, had the opportunity to review the scope of native tenants' rights in light of the Hawaiian Supreme Court's decision in this case.

Pai 'Ohana, claiming under Hawaii statutory and case law a reserved customary right of exclusive use and occupancy in federal park lands, asked the District Court to

> consider more recent decisions, particularly those of the Hawaii Supreme Court under Chief Justice Richardson, and to conclude that because Dowsett "was decided during an era when the Hawaii courts were bent upon conforming Hawaiian law to western property concepts," it "should therefore be reviewed in a different light today."

875 F. Supp. at 691-92 (citation omitted). Significantly, in a footnote, Pai 'Ohana observed that "the Hawaii Supreme Court has recently reembraced the Richardson Court's activist policy of affirming the rights of native tenants, particularly in regard to rights of use and access on undeveloped lands that were patented during the Mahele."[13] 875 F. Supp. at 692 n.25.

The Court of Appeals in *Pai 'Ohana*, had the opportunity to consider the Hawaiian Supreme Court's decision in this case and squarely rejected it. The court refused to accept the contentions of the appellants in *Pai 'Ohana* who advocated adoption of the holdings of this case. The Court of Appeals rejected the proposition that a native tenant could rely on native customs to

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[12] The United States District Court decided *Pai 'Ohana* after this case was decided by the Hawaii Supreme Court but before the opinion was published. However, on appeal, the Court of Appeals for the Ninth Circuit asked for and received briefs on this case before rendering its decision.

[13] *Mahele* refers to division, here of land. During the Great Mahele of 1848, the Kingdom of Hawaii awarded fee title to many of the *ahupua'a* in the Hawaiian Islands. *Pai 'Ohana*, 875 F. Supp. at 683 n.4.

create or preserve a use of property that was inconsistent with uses contemplated by the fee holder.

> Hawaiian history has proven that the scope of native tenants' rights is significantly more narrow than asserted by appellants. ... [T]he Hawaiian Usage clause does not support the proposition that native tenants possess exclusive use and occupancy rights over kuleana lands they failed to claim. Instead, prior to the Kuleana Act, native tenants remained on the land "at the will of the sovereign or superior, subject always to dispossession and redivision." Ancient custom did not include the right to remain upon and exclude others from the land.

Pai 'Ohana, 1996 WL 44731, *1.

While the decision to reject state law relating to property would appear to fly in the face of *Erie*, it is in fact consistent with decisions of this Court. *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966) (federal law will not displace state law absent a significant threat to any identifiable federal interest).

Applying *Wallis*, the Court of Appeals for the Fifth Circuit chose to apply federal common law rather than state common law in a case involving the exercise of eminent domain powers, not withstanding the fact that state laws will normally be applied to questions involving property interests. *Georgia Power Company v. 138.30 Acres of Land*, 617 F.2d 1112 (5th Cir. 1980).

> Basic considerations of federalism, as embodied in the Rules of Decision Act, prompt us to begin with the premise that state law should supply the federal rule unless there is ... a *showing that state law conflicts significantly with any federal interests or policies* present in this case.

Id. at 1115-16 (citing *Wallis*, 384 U.S. at 68 (emphasis added)).

In *Pai 'Ohana*, the Court of Appeals observed that Hawaiian laws protecting native rights of custom do not support the creation of property interests which are incompatible with those

of fee holders.[14] The Hawaiian court, to the contrary, subordinated the rights of fee holders to claimants of native Hawaiian customs. The Ninth Circuit's rejection of the Hawaiian Court's decision in this case was necessary to avoid the very constitutional conflicts sought to be avoided in *Wallis*. Had the Court of Appeals in *Pai 'Ohana* adopted an interpretation of Hawaiian laws as newly defined in this case, property rights of land owners could be abridged by application of Hawaiian custom to such a degree as to constitute a taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Review should be granted to resolve this conflict.

CONCLUSION

The Hawaiian court seeks to enlarge the rights of native Hawaiians so far beyond all previously defined limits as to make essentially meaningless fundamental notions of property ownership.[15] The Supreme Court of Hawaii seeks to "exempt [itself] from a century of development of the American common law."[16] To the extent that these newly discovered "traditions" extend beyond any limits contemplated by Congress, they violate the Fifth and Fourteenth Amendments, both as to takings and equal protection.

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[14] In *Pai 'Ohana*, the interests asserted were rights of exclusive use and occupancy. *Pai 'Ohana*, 1996 WL 44731, *1.

[15] Perhaps this is intended, given the court's suggestion, "the regulatory power provided in article XII, section 7, does not justify summary extinguishment of such rights by the State merely because they are deemed inconsistent with generally understood elements of the western doctrine of "property." Pet. App. at 37a. However, this intention appears at the very least inconsistent with constitutional committee reports, as cited in *Pai 'Ohana*, which warned that "article XII, section 7 'does not attempt to grant unregulated, abusive and general rights to native Hawaiians ....'" *Pai 'Ohana*, 875 F. Supp at 695.

[16] Pai 'Ohana, 875 F. Supp. at 696.

This case is controlled by two lines of decision of this Court. It has been held that a deprivation of a property interest which implicates the Takings Clause but for which compensation is not provided violates the Fifth and Fourteenth Amendments. Furthermore, a federal court which must otherwise follow state decisional law may not do so where it would conflict significantly with any federal interests. The decision of the Hawaii Supreme Court violates the United States Constitution and is in conflict with both the decisions of this Court as well as inferior Federal Courts and, as such, Nansay's petition should be granted.

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Respectfully submitted,

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